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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.W., a Person Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY et al.,

Petitioners and Appellants,

v.

D.W. et al.,

Defendants and Respondents.

D053516

(Super. Ct. No. J516979)

APPEAL from an order of the Superior Court of San Diego County, Yvonne E.  
Campos, Judge. Reversed.

The San Diego County Health and Human Services Agency (Agency) and J.W.,  
the minor, appeal a court order of the Superior Court of San Diego County admitting  
paternity test results showing Johnny G. is J.W.'s biological father and continuing  
Johnny's participation in the juvenile court proceedings. The Agency and J.W. argue: (1)

the court erred by receiving in evidence blood test results designating Johnny as the biological father; (2) Johnny had not achieved presumed father status under Family Code sections 7611 and 7612 and therefore, lacked standing to challenge D.W.'s conclusive presumption of parentage; (3) the court lacked authority for entering a judgment of parentage because a prior judgment establishing paternity already existed; and (4) the court erred by not issuing a judgment of non-paternity regarding Johnny. We reverse the trial court's order granting Johnny biological father status.

#### FACTUAL AND PROCEDURAL BACKGROUND

J.W. was born in November 2005. Her birth certificate designates her mother as R.W. (mother) and her father as D.W. (D.) J.W. was born during the course of her mother's marriage to D.

In January 2008 the Agency filed a petition on behalf of J.W. under Welfare and Institutions Code section 300, subdivision (b). The petition alleged J.W. tested positive for opiates and that mother suffered from a mental illness causing her to seek treatment for illnesses J.W. did not have. According to the detention report, mother told the social worker that D. was not J.W.'s biological father. Mother, however, did not disclose the name of the biological father. J.W. referred to D. as her father and mother was married to D. at the time of J.W.'s birth.

The court held a detention hearing in January 2008. The court considered the issue of parentage. D. appeared at the hearing and submitted a completed declaration of parentage stating he had been married to mother from May 16, 2003, until December 16, 2006, and was living with her at the time J.W. was conceived and eventually born. J.W.

lived with D. from November 2005 through May 2006. He visited the home during 2006 and 2007. After he separated from mother, the family court issued an order requiring D. pay J.W. child support. He also provided J.W. with medical insurance.

Mother completed a paternity questionnaire indicting Johnny submitted to a paternity test in January 2007 and that Johnny was J.W.'s biological father. Mother declared she had been in a relationship with Johnny from 1999 through 2007 and was married to D. during the time she had sexual relations with Johnny. The juvenile court requested proof of the paternity test and deferred the issue of paternity until the next court hearing. The court detained J.W. and ordered she be placed in out-of-home care.

In the jurisdiction and disposition report, mother told the social worker that D. was the only father J.W. had ever known. D. considered J.W. to be his daughter and had supported J.W. throughout her life. He stated he wants custody of J.W. and is very close to her. He remained adamant that Johnny never "did anything" for J.W. and was not involved in J.W.'s life. J.W. also had a relationship with D.'s mother, the woman J.W. considered to be her paternal grandmother. D. requested that J.W. be placed with her grandmother in Florida until he could relocate to Florida. The grandmother indicated she was prepared to care for J.W. on a long term basis because she viewed J.W. as her grandchild. The Agency recommended that D. be granted presumed father status and that D.'s visitation with J.W. be unsupervised.

The court held a jurisdiction hearing. The court entered a finding that D. was J.W.'s presumed father under Family Code section 7540.<sup>1</sup> Johnny appeared at the hearing and based on representations that J.W. knew Johnny, the court granted Johnny supervised visits and added him to the petition as an alleged father.

The court ordered an evaluation of the grandmother's home in Florida before placing J.W. in her care. The court made a true finding based on the petition and scheduled a contested disposition hearing to address the issue of parentage.

In an April 2008 settlement conference, Johnny sought to establish his status as J.W.'s biological father and rebut D.'s conclusive presumption of paternity. The court lodged Johnny's paternity test results generated in January 2007 and scheduled a disposition hearing. At the upcoming hearing, the court would address placement of J.W. with D., whether Johnny is the biological father of J.W. and whether Johnny could rebut D.'s presumption of paternity.

In an addendum report, the social worker reiterated D.'s preference that J.W. be placed with his mother in Florida so that he could move to Florida and raise J.W. with the assistance of his mother. D. emphasized to the social workers that J.W. saw him as her father and knows his mother as her grandmother. He had been paying \$419 a month in child support for J.W. after his separation from mother and D. believed Johnny has no standing to request that J.W. be placed with him.

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<sup>1</sup> All statutory references are to the Family Code unless stated otherwise.

Johnny reported that he had 10 other children but that he had spent time with J.W. and mother when they visited him at his home. Johnny requested the court place J.W. with him, or that he be allowed to visit with J.W. The social worker referred to a visitation report indicating that during visits between Johnny and J.W., J.W. was quiet and she instead viewed D. as her father. J.W.'s foster mother noticed J.W. was attached to D. and viewed him as a father figure. The Agency did not recommend placing J.W. with Johnny based on the absence of a bond between them.

At a contested disposition hearing held in June 2008 the court revisited the issue of whether or not to admit in evidence Johnny's January 2007 blood test results that concluded he was the biological father of J.W. Counsel for the Agency and J.W. objected to the test being considered or admitted by the court on the grounds there was no compliance with the foundational requirements, the test had not been authenticated, the process by which the test was obtained was unknown, the test was not obtained in connection with any court proceeding and the test results were hearsay. The court acknowledged it had never seen test results presented in the manner in which Johnny's tests were presented.

The court heard testimony from Johnny concerning his relationship with mother and J.W. Johnny testified mother was living at her sister's house when she became pregnant with J.W. He admitted to having a sexual relationship with mother when she told him she was pregnant. He continued to see mother during her pregnancy and he had no knowledge that she was living with D. Johnny claimed that when J.W. was about one year old, he spoke with D. concerning J.W.'s child support. Johnny testified he agreed to

assume some of the child support payments but didn't follow up with D. about that agreement.

Johnny claimed he saw J.W. on a regular basis when his family lived next door to mother. Mother moved to a new home when J.W. was about two years old. Johnny testified that he submitted to a paternity test at mother's request. He learned of the results and claimed it did not change his relationship with J.W. He continued to visit J.W. at mother's home and bought diapers for J.W. on a few occasions.

On cross examination, Johnny admitted he did not know J.W.'s birth date and he had not visited J.W. since she had been placed in foster care. He further admitted he did not take any legal action to establish his parentage. During mother's pregnancy, he did not pay for any of mother's expenses. He also did not pay mother any income for child support after J.W.'s birth.

At the conclusion of the hearing, the juvenile court considered the issue of whether prior determination of parentage had been made by the family court when it ordered D. to pay child support. The court reviewed the family court file and noted child support orders had been made. The court did not see a judgment of paternity form in the file.

The court then admitted Johnny's January 2007 blood test and adjusted Johnny's designation from alleged father to biological father. The court continued to designate D. as J.W.'s presumed father. The court found that even though Johnny believed he was J.W.'s biological father after he submitted to the blood test, he did not take action to establish a parent-child relationship with J.W. The court did not order visitation for Johnny and instead instructed the Agency to meet with Johnny to address visitation. The

court found it had jurisdiction, declared J.W. a dependent and removed J.W from mother's care. The court further ordered the Agency to conduct an Interstate Compact on the Placement of Children (ICPC) evaluation of D.'s mother's home in Florida. J.W. remained placed in a foster home pending the completion of the evaluation. The court ordered reunification services for mother and visitation for D. The court scheduled a six-month review hearing. Johnny timely filed a notice of appeal.

## DISCUSSION

### I

#### *Blood Tests and Determining Paternity*

The Agency asserts the court erred by admitting in evidence Johnny's blood test results because the results had not been authenticated and were hearsay, lacking in all proper foundation. J.W. joins in the argument.

#### *A. Factual and Procedural Background*

During the proceedings, Johnny sought to submit in evidence test results indicating he could not be excluded as J.W.'s biological father. The admission of the test results were opposed by counsel for D., the Agency and J.W. They objected to the test being admitted by the court on the grounds there was no compliance with the foundational requirements, the test had not been authenticated, the process by which the test was obtained was unknown, the test was not obtained in connection with any court proceeding and the test results were hearsay. The court overruled the objections, received the test results in evidence and designated Johnny as J.W.'s biological father.

### *A. Admission of Johnny's Blood Tests*

Under section 7552, in a proceeding in which paternity is a relevant fact, the court may upon its own initiative or as suggested by another person involved in the proceeding, order the mother, child, and alleged father to submit to genetic tests. (See § 7551). The genetic tests shall be performed by an approved laboratory. (See § 7552.) "The trial court is 'vested with broad discretion in ruling on the admissibility of evidence.' [Citation.] '[T]he court's ruling will be upset only if there is a clear showing of an abuse of discretion.' ' "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. . . ." ' " (*Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431-1432.)

The juvenile court did not exclude Johnny's paternity test on hearsay and foundational grounds. However, the record shows that Johnny produced no evidence of paternity that is " 'reasonable, credible, and of solid value. . . .' [Citations.]" (*In re Angelia P.* (1981) 28 Cal.3d 908, 924.) There was no compliance with the foundational requirements for the admission of paternity test results into evidence. (See § 7552.5.) Johnny did not make the showing required by section 7552—that the testing was performed by an approved laboratory—in order to establish paternity. He did not explain how a DNA sample was obtained from J.W., when the dependency court did not order paternity testing and Johnny had no authority to authorize a testing company to obtain a DNA sample from J.W. Accordingly, the court abused its discretion by admitting the paternity results in evidence and the court improperly designated Johnny as the biological father.



## II

### *Johnny Lacked Standing to Challenge the Conclusive Presumption of Parentage*

The Agency and J.W. argue Johnny did not have standing to challenge the conclusive presumption of D.'s presumed father status that D. achieved under section 7540. Specifically, Johnny was not a presumed father under sections 7611 and 7612 and thus, he lacked standing to challenge the presumption.

#### *A. Standard of Review and Relevant Law*

The issue of whether an individual has standing to present evidence is a question of law, not fact. Questions of law are subject to de novo review. (*In re Daniel M.* (1996) 47 Cal.App.4th 1151, 1154.)

California law recognizes three types of fathers: presumed, natural, and alleged. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 448; *In re Kobe A.* (2007) 146 Cal.App.4th

1113, 1121.) A presumed father, as defined by section 7611,<sup>2</sup> is entitled to appointed counsel, custody (if there is no finding of detriment) and reunification services. (*In re Kobe A.*, *supra*, 146 Cal.App.4th at p. 1120.) A man who has been established as the child's biological parent is a natural father. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 449, fn. 15.) A natural father can be a presumed father, but is not necessarily one; a presumed father can be a natural father, but is not necessarily one. (*Id.* at p. 450, fn. 18.) A man who may be the father of the child but has not yet been established as the natural or presumed father is an alleged father. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801; *In re Zacharia D.*, *supra*, 6 Cal.4th at p. 449, fn. 15.) An alleged father's rights are limited to establishing that he is entitled to presumed father status, and the juvenile court may

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<sup>2</sup> Section 7611 reads in pertinent part: "A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 or in any of the following subdivisions: [¶] (a) He and the child's natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce, or after a judgment of separation is entered by a court. [¶] (b) Before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [¶] (1) If the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage, or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce. [¶] (2) If the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation. [¶] (c) After the child's birth, he and the child's natural mother have married, or attempted to marry, each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and either of the following is true: [¶] (1) With his consent, he is named as the child's father on the child's birth certificate. [¶] (2) He is obligated to support the child under a written voluntary promise or by court order. [¶] (d) He receives the child into his home and openly holds out the child as his natural child."

terminate the alleged father's parental rights when the alleged father has had the opportunity to do so. (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811.)

Presumed fathers are accorded greater rights than natural fathers because fathers who have a connection with or have shown a commitment to the child are more deserving than those whose only link is biological. (*In re Zacharia D.*, *supra*, 6 Cal.4th at pp. 448-449.) Under section 7611, a man is presumed to be a child's father based on the man's relationship with the mother, such as marriage or attempted marriage to the mother (see § 7611, subds. (a), (b), (c)), or commitment to the child, such as acknowledging paternity and providing a home (see § 7611, subd. (d)). The purpose of section 7611 in dependency proceedings "is to determine whether the alleged father has demonstrated a sufficient commitment to his parental responsibilities to be afforded rights *not* afforded to natural fathers -- the rights to reunification services and custody of the child." (*In re Jerry P.*, *supra*, 95 Cal.App.4th at p. 804.)

Paternity status is important because it determines a father's rights in a dependency case and the extent to which he may participate in the proceedings. (*In re Kobe A.*, *supra*, 146 Cal.App.4th at p. 1120.) A presumed father, as defined by section 7611, is entitled to appointed counsel, custody (if there is no finding of detriment) and reunification services. (*Ibid.*) A biological father is an individual whose paternity has been established but who has not shown he qualifies as the child's presumed father under section 7611. (*In re Zacharia D.*, *supra*, 6 Cal.4th at p. 449, fn. 15.) The juvenile court may provide reunification services to a biological father if it finds services will benefit the child. (Welf. & Inst. Code § 361.5, subd. (a).) An alleged father is a man who might

be the father of a child, but whose biological paternity has not been established. (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 715.) Because his paternity has not yet been established, an alleged father does not have a current interest in a child. (*In re O.S.* (2002) 102 Cal.App.4th 1402, 1406.) Thus, alleged fathers have significantly fewer rights than biological fathers and presumed fathers. An alleged father is not entitled to appointed counsel or to reunification services. (*In re Kobe A., supra*, 146 Cal.App.4th at p. 1120.) The due process rights of an alleged father are satisfied by giving him notice and an opportunity to appear, assert a position, and attempt to change his paternity status. (*Ibid.*)

#### *B. D.'s Presumed Father Status Under Section 7540*

Under section 7540, "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." Under section 7541, requests for blood tests to rebut the conclusive presumption of paternity must be made within two years of the child's birth and can only be made by the husband, the child, the mother or a "presumed father" as defined in sections 7611 and 7612. In the absence of a request for blood tests challenging paternity within two years of the child's birth, the presumption is conclusive. (§ 7541; *In re Marriage of Freeman* (1996) 45 Cal.App.4th 1437, 1444.)

The record shows D. is the conclusively presumed father of J.W under section 7540. J.W. was born during the marriage of mother and D. and there was no legal challenge to D.'s paternity during the two years after J.W.'s birth. Indeed, the juvenile court expressly found D. was J.W.'s presumed father. Once D.'s presumed father status

was established, he was entitled to custody of J.W. and to reunification services.

(*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 596, citing *In re Zacharia D.* (1993) 6 Cal.4th 435, 448-449, 451.)<sup>3</sup>

Johnny lacks standing to challenge D.'s presumed father status established under section 7540. Such a challenge can only be made by a person designated as a presumed father under sections 7611 and 7612, the husband, the child or the mother not later than two years from the child's date of birth. (§ 7541 (b), (c); *Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 240.) Johnny does not qualify as a presumed father under sections 7611 and 7612 because he was not married to mother nor did he attempt to marry her. Johnny is not listed on J.W.'s birth certificate as the father, he did not provide child support and he did not provide J.W. with a home. (See § 7611, subds. (a)-(d).) Further, because Johnny was not a presumed father under sections 7611 and 7612, he could not challenge D.'s status with his January 2007 blood test because the test was not secured by properly filing a noticed motion within two years of the child's birth. Even had he secured a proper blood test, Johnny still cannot challenge D.'s status because Johnny is not a presumed father. (§ 7541, subds (b)-(d).) Johnny, therefore, lacked standing to challenge D.'s presumed father status. (*Rodney F. v. Karen M.*, *supra*, 61 Cal.App.4th at pp. 237-241.)

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<sup>3</sup> Although D. may be excluded as J.W.'s biological father, he remains a presumed father. In the dependency context, presumed father status is not rebutted or negated by evidence someone else is the biological father. (*In re Jerry P.*, *supra*, 95 Cal.App.4th at p. 804; see also *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 823, fn. 3 [man may be presumed father even if paternity is legally disproved].)

### III.

The Agency asserts the issue of D.'s parentage had been previously resolved in family court when that court ordered D. to pay child support for J.W. The Agency claims the child custody order implies that a prior judgment of paternity already existed to establish D.'s parentage and thus, the juvenile court did not have authority to enter an alternative parentage finding.

California Rules of Court, rule 5.635, establishes a juvenile court's "duty" in a dependency proceeding "to determine the parentage of" a child if "parentage" has "not otherwise [been] determined." (Cal. Rules of Court, rule 5.635(a).) The rule goes on to state if "there has been no prior determination of paternity of the child, the juvenile court must take appropriate steps to make such a determination." (Cal. Rules of Court, rule 5.635(e).) The court may make its determination of parentage "based on the testimony, declarations, or statements of the alleged parents." (Cal. Rules of Court, rule 5.635(e)(3).) A determination of paternity is also satisfied through a superior court order or judgment establishing parentage or through the execution and filing of a voluntary declaration under the section 7570. (Cal. Rules of Court, rule 5.635(d)(2); § 7570, et seq.)

The juvenile court considered the issue of whether there had been a prior determination of parentage made by the family court when it ordered D. to pay child support. At the June 20, 2008 disposition hearing, the juvenile court noted a child support order had been issued but that an actual judgment of paternity form could not be located. Counsel for Johnny noted the court could possibly infer that a judgment of

paternity had been entered because otherwise the family court would not have issued child support orders. The record shows, however, that the juvenile court did not issue findings stating that such an inference could be made. The record also shows the juvenile court did not find a prior determination of parentage previously had been made by the family court.

Regardless of whether a prior determination had been made in family court, during the instant dependency the juvenile court received D.'s declaration under penalty of perjury stating he was married to and living with mother at the time J.W. was conceived. Based on this declaration, the juvenile court rendered the appropriate judgment of paternity under section 7540. Johnny concedes the juvenile court made this finding during the dependency. Thus, the juvenile court properly determined the parentage of J.W. in the absence of an explicit determination by the family court.<sup>4</sup>

#### IV.

##### *The Agency's Request for a Judgment of Non-Paternity Against Johnny*

The Agency asserts that assuming the juvenile court properly admitted Johnny's blood test and established that he is J.W.'s biological father, this would have created a dependency in which there is a presumed father and a biological father. The juvenile

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<sup>4</sup> We do not address whether the juvenile court could have inferred that a prior determination of parentage had been made by the family court because the trial court never decided that question of fact. To make an independent finding would require this court to assume the role of the trier of fact. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 405; see also *In re Nikki R.* (2003) 106 Cal.App.4th 844, 855.)

court should have taken steps to resolve the parentage issue such that J.W. would not have two fathers.

We concluded, *ante*, that the blood tests were improperly admitted and Johnny has not been established as J.W.'s biological father. Accordingly, Johnny is an alleged father, not a biological one, and we need not address the Agency's argument. In any event, the supreme court in *In re Jesusa V.* (2004) 32 Cal.4th 588, discussed the scenario in which one man has been identified as the presumed father and another man is the biological father. It set forth guidelines for the juvenile court to consider during the reunification period of a dependency: "A declaration of presumed fatherhood entitles the presumed father to reunification services and custody of the [minor]." (*Id.* at p. 610.) Presumed father status for one man does not, however, terminate the biological father's parental relationship with the minor. The biological father continues to be the minors' biological father, is named on the minor's petition, and receives notice of future hearings. The biological father is not entitled to services and he is not entitled to custody. (*Id.* at p. 610.) If Johnny were to remain on the petition as J.W.'s biological father, his rights would have been significantly fewer than D.'s rights as a presumed father. There is no indication by the court in *In re Jesusa V.*, *supra*, that having a biological father or, alternatively, an alleged father and a presumed father is legally improper.<sup>5</sup> Accordingly,

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<sup>5</sup> It appears the Agency wishes, in theory, to address the situation in which a biological father receives services and becomes a presumed father, thereby creating a situation in which there are two presumed fathers. That is a fact specific situation to be handled by a court should it ever arise on appeal. We will not address it here.



the court did not err by not entering a judgment for non-paternity against Johnny nor did it err by failing to strike him from the dependency petition.

DISPOSITION

The order establishing Johnny as the biological father is reversed.

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NARES, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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IRION, J.